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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 494

WILLIAM ELDEN,

*Petitioner,*

vs.

ADDISON FARMERS MUTUAL INSURANCE COMPANY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

WILLIAM ELDEN,
1630 W. 47th Street,
Chicago, Illinois 60609,
YArds 7-6765,
*Attorney for Petitioner.*

MIDWEST LAW PRINTING CO., 225 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-2905

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Petitioner, William Elden, prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, Second Judicial District, entered in this cause on December 27, 1967, and February 1, 1968.

## OPINIONS BELOW

An opinion was rendered by the Appellate Court, Second Judicial District, which is listed in Appendix A.

## JURISDICTION

The judgment of the Appellate Court (Appendix A, *infra*) was entered on December 27, 1967. A motion to vacate that judgment and for other relief was denied on November 28, 1967. (Appendix B, *infra*) A timely "Petition for Appeal As a Matter of Right, or, in the Alternative, for Leave to Appeal" was denied by the Illinois Supreme Court on May 28, 1968. (Appendix C, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTION PRESENTED

Whether a state reviewing court may, consistent with the due process and equal protection clauses of the Fourteenth Amendment, deny appellate review in a civil case where Petitioner filed his record and fully perfected his appeal by timely action, filed his brief and thereafter made timely requests, supported by affidavits, that an abstract or excerpt of record in accordance with Supreme Court Rule 342(i) which the court denied although no objection was made and judgment of the reviewing court dismissing his appeal was entered; and where the state constitution grants all persons an appeal as a matter of right and the timely filing of briefs and abstracts is not a jurisdictional requirement?

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. * * * No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, Section 7 of the Constitution of the State of Illinois provides in pertinent part:

> "In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court * * *"

Former Rule 41(2) of the Illinois Supreme Court (Ill. Rev. Stat., 1965, Ch. 110, §101.41(2)) provided in pertinent part:

> "* * * If in any cause, whether on appeal or writ of error, either the abstract or brief is not filed within the time proscribed, the appeal or writ of error will, on the call of the docket, be dismissed. * * *"

Present Rule 342 of the Illinois Supreme Court (Ill. Rev. Stat., 1967, Ch. 110A, §342), superseding former Rule 41(2), provides:

> (a) *Designation and Contents of Excerpts from Record.* The appellant shall serve upon the other parties to the appeal and file in the reviewing court no later than the day his brief is required to be filed a designation of the excerpts from the record on appeal to be duplicated (entitled Excerpts from Record) which shall contain the judgment or order appealed from, the notice of appeal, and the parts of the record deemed essential for the judges of the reviewing court to read in order to decide the issues presented, together with proof of service thereof

upon the other parties to the appeal. Exhibits which cannot be economically duplicated need not be included in the excerpts from record. The appellee shall file a designation of any additional excerpts from the record on appeal that he deems it essential for the judges of the reviewing court to read, together with proof of service thereof, not later than the day upon which his brief is required to be filed. Appellant may file and serve an additional designation of any additional parts of the record that he deems necessary to meet the points raised in the appellee's brief or the appellee's additional designation no later than the due date of the excerpts from record. Instead of serving designations, the parties may at any time after the filing of the record on appeal but no later than the due date of the reply brief file a written stipulation designating what shall be included in the excerpts from record.

(b) *Time for Filing; Narrative Statement by Agreement.* No later than 14 days after the due date of the appellee's brief, the appellant shall prepare and file the excerpts from record, which shall contain the parts of the record that have been designated by the parties unless they stipulate for less. In the alternative, the clerk of the reviewing court, upon request of the appellant made on or before seven days after the due date of the appellee's brief, may prepare and file the excerpts upon payment of charges to be set by administrative order of the court. Extensions or reductions of time may be obtained in the manner prescribed for briefs. See rule 343(b). If the parties agree on a narrative statement or other abbreviation of any evidence or portion of the record on appeal, the appellant may substitute the abbreviated material in the excerpts from record for a copy of the corresponding portion of the record. For the purposes of preparing the excerpts from record, the appellant's attorney may unbind the record on appeal, but he shall promptly restore it to its original form.

## STATEMENT

On December 6, 1966, the Circuit Court of DeKalb County granted Defendant's motion to strike Plaintiff's amended complaint because it did not plead specific performance of conditions precedent in a fire insurance policy, but stated generally it had performed all conditions precedent as required by Supreme Court of Illinois Rule 133(c).

Plaintiff-Appellant properly presented an Appeal to the Appellate Court of Illinois—Second District by filing a Notice of Appeal with the Clerk of the Circuit Court of DeKalb County at Sycamore, Illinois.

That thereafter the following sequence of events occurred:

Initially, the Clerk of the Circuit Court of DeKalb County filed a short record in this matter, although none was necessary since an extension of time was obtained by your Petitioner in order to properly present the Report of Proceedings to the trial judge.

On June 1, 1967, the Report of Proceedings was presented to Judge Millet for his signature which he appended to the Report of Proceedings at that time.

Knowing that a short record had been filed, Plaintiff-Appellant asked Judge Millet for permission to transfer this Report of Proceedings to the Second Appellate District at Elgin, Illinois. Judge Millet declined this suggestion and turned the Report over to the Clerk for transmittal.

As late as July 18, 1967, Plaintiff-Appellant checked with the Clerk of the Second Appellate District and found that this Report of Proceedings had not been filed.

On July 18, 1967, Plaintiff-Appellant wrote to the Clerk of the Circuit Court and asked whether the Report of Proceedings had been transmitted. Upon receipt of Plaintiff-Appellant's letter, the Clerk called and said he was waiting for the short record to be returned to him so that he could incorporate the Report of Proceedings into the short record.

Thereupon, Plaintiff-Appellant sent the short record to the Clerk of the Circuit Court of DeKalb County and since that time has not had this record in his possession.

During this period, the Clerk of the Appellate Court asked that the record be returned to his office immediately.

That also during this period, Plaintiff-Appellant wrote his brief in this matter without aid of the record.

That an examination of the brief shows no reference to the record.

On July, 31, 1967, the court on its own motion, dismissed this appeal.

On August 14, 1967, Plaintiff-Appellant filed a motion to reinstate this cause and the acceptance of his brief instanter. Since Plaintiff-Appellant was unable to again obtain the record, he used the sole remaining means of obtaining a hearing in this matter which was available to him, namely that of filing a motion asking that the Abstract and Excerpts of Record be waived in this matter in accordance with Supreme Court Rule 342(i).

That undoubtedly because of this, the court denied the motion, but in its denial it did not allow the Appellant any time in which to file his abstract or excerpts of record.

That this matter was further complicated by the fact that the Respondent was entitled to the Record for the next 35 days in order to prepare his brief, nor did he notify Plaintiff that he did not intend to file a brief which notice is implied in the last sentence of Supreme Court of Illinois Rule 343(a).

That this was further compounded by the fact that Plaintiff-Appellant misconstrued the court order and assumed his motion had been allowed.

However, even if this misconstruction had not taken place, it still would have been impossible under these circumstances for Plaintiff-Appellant to obtain the record to prepare either his abstract or excerpts of the record.

That the court not being cognizant of the above sequence of events denied Plaintiff's motion for the waiving of the Abstract or Excerpts of Record in this cause, even though the record consisted principally of the following:

a) *Amended Complaint*
b) *Motion To Strike*
c) *Report Of Proceedings*
(Emphasis Supplied)

which is the most minimal of records that can be compiled in any one case.

The Appellate Court of Illinois—Second District, on December 27, 1967, rendered an opinion in the appeal taken to that court in this cause from the Circuit Court of DeKalb County—see Appendix, in which it dismissed this appeal.

A petition for Leave to Appeal to the Supreme Court of Illinois was denied on May 27, 1968.

## REASONS FOR GRANTING THE WRIT

Article VI, Section 7 of the Illinois Constitution provides:

> "In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court * * *"

Due to the above, in Illinois, a party to a civil action has a constitutional right of appeal.[1] *Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill. 2d 106, 219 N.E. 2d 499. Arbitrary or capricious action denying this right not only violates the Illinois Constitution (*Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill. 2d 106, 219 N.E. 2d 499, 500), but denies due process and equal protection as well.

A similar question has previously been before the Court. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.,* 348 U.S. 37. In considering "whether a state appellate court violates either the Due Process or the Equal Protection Clause of the Fourteenth Amendment * * *

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[1] Although the Supreme Court of Illinois has previously held that dismissing an appeal confers jurisdiction as a matter of right in that Court to determine the propriety of the dismissal, "for if the appellate court's dismissal was improper, [appellant has] been denied [his] constitutional right of appeal * * * as the order of dismissal precludes review of the trial court action," (*Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill. 2d 106, 219 N.E. 2d 499, 500) that Court refused to consider the merits of the Appellate Court's action in the present case. As a consequence, there has been no opinion, decision or holding on this question.

when it dismisses an appeal from a money judgment as a reasonable measure for safeguarding the collectibility of that judgment" (348 U.S. at 38), the Court established the framework within which the present Petition is composed. There, the Court decided that a claimed violation of the equal protection clause would not lie where "no showing has been made that anyone comparably situated has been treated differently from petitioner." (348 U.S. at 41) Next, the Court held that the due process clause was not violated where the dismissal was reasonably directed at sustaining the effectiveness of the appealed judgment against the petitioner's attempt to frustrate it. (348 U.S. at 43-45) See also, *Eisler* v. *United States,* 338 U.S. 189; *Allen* v. *Georgia,* 166 U.S. 138.

Mr. Justice Black, who was joined by Mr. Justice Douglas in his dissent, felt that, since the state had provided a system of appellate review,

> "• • • proceedings in its supreme court are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that 'due process' which the Fourteenth Amendment requires. *Cole* v. *State of Arkansas,* 333 U.S. 196, 201-202, 68 S. Ct. 514, 517, 92 L. Ed. 644, and cases there cited. And [the state] also must abide by the Fourteenth Amendment's equal protection command in deciding who can and who cannot appeal. *Cochran* v. *State of Kansas,* 316 U.S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453." (348 U.S. at 45-46)

The dissent viewed the dismissal order as "punishment" for the petitioner's disobedience of a court order, "an offense having no relation at all to the merits of the plaintiff's claim or to the petitioner's defense." (348 U.S. at 46-47) Because the appeal was a continuation

of the defense which began in the trial court and "From the beginning, due process and equal protection have meant that every defendant must be permitted to defend himself in any court where his antagonist can appear and prosecute" (348 U.S. at 47; see also, *Hovey* v. *Elliott,* 167 U.S. 409), and because that right belongs to "one who has violated the laws the same as one who has not" (348 U.S. at 47), the dissent criticized the dismissal as a violation of Fourteenth Amendment rights.

Without settling the issues here presented—except, of course, insofar as the dissent's view would clearly support Petitioner's claim—*National Union* set the pace for later decisions. Thus, when the Court learned that a transcript of evidence was critical to effective appellate review of criminal convictions in Illinois and that indigent defendants were being denied such review solely because they could not afford transcripts, it condemned Illinois practice as a deprivation of equal protection and instructed the state to implement its appellate procedures to make them equally and fairly available to all. *Griffin* v. *Illinois,* 351 U.S. 12. A similar attitude was taken toward state procedures which denied effective review because of the lack of counsel (*Douglas* v. *California,* 372 U.S. 353), or because of the lack of ability to prepay statutory docketing fees (*Burns* v. *Ohio,* 360 U.S. 252). There is no particular mystique which differentiates these later decisions merely because they were rendered in the course of criminal prosecutions. As both the majority and dissent in *National Union* pointed out, once providing for appeal, a state must provide it equally and fairly to all. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.,* 348 U.S. 37, 43, 45.

As a consequence, the question here presented is whether a state court may, within these limits described by *National Union*, punish counsel's delay—specifically permitted by Rule (Ill. Rev. Stat., 1967, Ch. 110A, §343)—by denying appellate review. The question is high-lighted by the fact that here the delay did not evince a disregard for the rules of court, did not threaten the effectiveness of the judgment and was non-jurisdictional in nature.

In Illinois, the timely filing of briefs, abstracts, and excerpts from record is not a jurisdictional step in the process of appeal. Prior to the adoption of new Rules of the Supreme Court of Illinois, if a brief or abstract were not filed within the time prescribed, the appeal would be dismissed on the call of the docket. Ill. Rev. Stat., 1965, Ch. 110, §101.41(2). New Supreme Court Rule 343 (Ill. Rev. Stat., 1967, Ch. 110A, §343), dealing with the filing of briefs and abstracts, omitted that provision. The committee which drafted those rules noted in connection with this omission:

> "The provision in the former rule that if a brief or abstract was not filed within the time prescribed the appeal would be dismissed on the call of the docket was omitted as both too strict and unnecessary. The court has the inherent power to dismiss an appeal for any breach of its rules, although a less drastic remedy would normally suffice. In the rare instances in which a brief of an appellant is inexcusably not filed on time, the court can exercise this power without any provision in the rule specifically authorizing it to do so."

Whether this most drastic remedy should have been imposed in the present case, therefore, raises questions of due process and equal protection unlike those settled in

*National Union.* There, it was decided that the petitioner had attempted to frustrate the effectiveness of the state court's judicial process by his actions. (348 U.S. at 43-45) It was also shown that this conduct did jeojardize the effectiveness of this judgment. (348 U.S. at 44) Here, not only did the failure to file Petitioner's brief and abstract on time not jeopardize the effectiveness of the orders and decrees being appealed, but the circumstances demonstrate that the delay in filing was not inexcusable nor an attempt to frustrate the judicial process. It was, as the dissent in *National Union* pointed out (348 U.S. at 46), as though the dismissal were punishment for disobedience of the time regulations for filing rather than a means for safeguarding the judgment itself. This is made clear by the fact that, also unlike *National Union,* the appeal was summarily dismissed. See also, *Burns* v. *Burns,* 35 Ill. App. 2d 34, 181 N.E. 2d 605.

Whether a reviewing court may, under these circumstances, totally deprive a party in a civil action appellate review of asserted trial court errors is as important a question as whether a state may deny effective appeal on the basis of other arbitrary standards. The majority in *National Union* held that the equal protection claim could not be sustained because no showing had been made that petitioner had been treated differently from anyone comparably situated. (348 U.S. at 41) Although no such showing is made here, none could possibly be made. The nature of the circumstances assertedly justifying the dismissal defy the making of any such showing. Motion to waive filing of abstracts or excerpts of record are quite common in Illinois, especially in the First District where Plaintiff-Appellant practices. This is especially true where the opposing party does not object. It is rare indeed

when the court on its own motion files such a demand. It is safe to say that the request made by Petitioner here would have been made by any other comparably situated appellant in Illinois. No modern decision in Illinois records the fate of any appellant who has suffered as drastic a penalty as Petitioner under similar circumstances. Compare *Burns* v. *Burns*, 35 Ill. App. 2d 34, 181 N.E. 2d 605.

Illinois Supreme Court Rule 342(b) gives the Clerk of the Court the power to prepare the Excerpts of Record if desired. Why could not this have been done and proper costs assessed against the appellant. Should not the punishment fit the crime?

As a consequence, it is important for this Court to consider whether the Fourteenth Amendment prohibits a state from denying appellate review as a remedy for a failure to file abstracts or excerpts from the record in time, does not jeopardize the effectiveness of the judgment being appealed, is not jurisdictional, and where the penalty is not proportionate to the "offense" nor to a fixed standard of experience.

## CONCLUSION

For the above and foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM ELDEN,
1630 W. 47th Street,
Chicago, Illinois 60609,
YArds 7-6765,
*Attorney for Petitioner.*